Supreme Court, U.S.
FILED
MAR 31 1995
OFFICE OF THE CLERK

(10)

No. 94-12

In the Supreme Court of the United States

October Term, 1994

SEMINOLE TRIBE OF FLORIDA,

Petitioner,

v.

STATE OF FLORIDA, AND
LAWTON CHILES, GOVERNOR OF FLORIDA

Respondents.

On Writ of Certiorari To The United States Court of Appeals For The Eleventh Circuit

BRIEF OF AMICUS CURIAE THE MICCOSUKEE TRIBE OF INDIANS OF FLORIDA, IN SUPPORT OF THE SEMINOLE TRIBE OF FLORIDA

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INTEREST OF AMICUS CURIAE

Amicus Curiae, the Miccosukee Tribe of Indians of Florida, files this brief in support of Petitioner, the Seminole Tribe of Florida.[1] The Miccosukee Tribe has existed as an independent federally-recognized Indian tribe since 1962 when it organized a council and board, pursuant to the Indian Reorganization Act, and formally became the Miccosukee Tribe of Indians of Florida. In 1971, the Miccosukee Tribe of Indians of Florida was the first Indian tribe in the nation to formalize a contract with the Bureau of Indian Affairs whereby it assumed complete responsibility for managing its own financial, social, economic, and political affairs.

Petitioner, the Seminole Tribe, sought a Tribal-State compact with the State of Florida, required under the Indian Regulatory Gaming Act (IGRA) as a pre-condition to establishing Class III gaming. When negotiations did not result in a compact, the Seminole Tribe sued the State of Florida. IGRA was enacted at the urging of states who wanted a voice in Indian gaming after the Supreme Court decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), which reconfirmed that tribal sovereignty is subordinate only to the federal government.

The State of Florida asserted sovereign immunity to bar the Seminole Tribe's suit under IGRA, even though IGRA was legislation which the states themselves had sought. The outcome of this litigation will directly affect the course of the Miccosukee Tribe's negotiations with the State as well as any litigation which might arise from those negotiations. The State of Florida's assertion of immunity, if sustained, would preclude Indian tribes from asserting

[1]Letters of consent to file this brief for Amicus Curiae have been filed with the Clerk of the Supreme Court.

their rights under IGRA to establish Class III gaming. One of IGRA's primary goals is to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments. 25 U.S.C. §2702(1). For the reason expressly set forth in IGRA – to obtain economic self-sufficiency – the Miccosukee Tribe sought a Tribal-State compact with the State of Florida in late 1993; the State failed to negotiate the compact in good faith.

In summary, the Miccosukee Tribe joins as Amicus Curiae in support of Petitioner, the Seminole Tribe of Florida, because the Eleventh Circuit Court of Appeal's decision that sovereign immunity barred the lawsuit by the Seminole Tribe against the State, has a direct and economically adverse effect on the Miccosukee Tribe of Indians which also is seeking to establish Class III gaming activities and which also has unsuccessfully sought a compact with the State of Florida.

STATEMENT OF THE CASE

Amicus Curiae adopts the Statement of the Case of Petitioner, Seminole Tribe of Indians.

SUMMARY OF ARGUMENT

The State of Florida relied on sovereign immunity to bar the Petitioner's lawsuit which alleged that the State had failed to negotiate in good faith, as required by the Indian Gaming Regulatory Act. The suit sought to compel the State, through the Governor, to conclude the Tribal-State compact and also requested declaratory judgment on the obligations of the State of Florida under IGRA to negotiate in good faith regarding the conduct of Class III gaming.

The State's assertion of Eleventh Amendment immunity should be rejected. The Eleventh Amendment does not by its terms preclude citizens from suing their own state; rather, it prohibits suits against a state by citizens of another state or by aliens. The judicially created doctrine of sovereign immunity found in *Hans v. State of Louisiana*, 134 U.S. 1 (1890), which bars citizens from suing their states, should be revisited.

Even if *Hans v. Louisiana* is not revisited, Congress had the power to abrogate the States' sovereign immunity when it enacted IGRA and it clearly intended to abrogate this immunity. The Eleventh Circuit Court of Appeals erred by reversing the district court's denial of the State's motion to dismiss on sovereign immunity grounds, on the basis that Congress did not have the power under the Indian Commerce Clause to enact IGRA. Congress had the power to abrogate the State's sovereign immunity under both the Indian Commerce Clause and the Interstate Commerce Clause. Both clauses derive from the same plenary grant of power in the Constitution, Article I, §8 cl.3.

Through the Indian Commerce Clause the states relinquished authority over Indian affairs to the federal government. Pursuant to its plenary power to legislate in the field of Indian affairs, Congress had the power to abrogate the sovereign immunity of the states. The Interstate Commerce Clause also gave Congress the power to enact IGRA because one of the stated concerns in its enactment was to prevent infiltration by organized crime in Indian gaming. At the urging of the states, and in order to provide the states with a voice in Indian gaming, Congress enacted IGRA. Having urged for its passage, the states cannot at the same time assert sovereign immunity to bar a suit by an Indian tribe for the state's failure to negotiate in good faith as required by the Act.

Finally, the Eleventh Amendment does not prohibit suits against state officials based upon federal law when prospective injunctive or declaratory relief is sought to vindicate federal law. Thus, under the doctrine of *Ex parte Young*, the relief requested by Petitioner is proper and the decision of the Eleventh Circuit should be reversed.

ARGUMENT

I.

THE ELEVENTH AMENDMENT DOES NOT EXPRESSLY BAR A CITIZEN FROM SUING THAT CITIZEN'S OWN STATE.

The language of the Eleventh Amendment does not expressly bar a citizen from bringing a suit against his own state. To the contrary, the text of the Eleventh Amendment refers only to suits brought by citizens of another state or a foreign country:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any Foreign State.

However, in *Hans v. State of Louisiana*, 134 U.S. 1 (1890), the Supreme Court held that a citizen's suit against that citizen's own state was barred and, as a result, judicially extended the Eleventh Amendment beyond its text. In fact, the Eleventh Amendment has no application outside the context of State/citizen and State/alien diversity suits. *See Blatchford v. Native Village of Noatak*, 501 U.S. 775 ____, 111 S.Ct. 2578, 2586 (1991) (Blackman, Marshall, Stevens, J.J., dissenting) and Amicus Curiae respectfully requests that *Hans v. Louisiana* be revisited.

Amicus Curiae urges the Court to adopt the interpretation of the Eleventh Amendment found in Justice Stevens' concurring opinion in *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989), which emphasizes the important "distinction between our two Eleventh Amendments." *Id.* at 23. First, there is the "correct and literal interpretation of the plain language of the Eleventh Amendment that is fully explained in Justice Brennan's dissenting opinion in *Atascadero State Hospital v. Scanlon*. In addition, there is the defense of State sovereign immunity that the Court has added to the text of the Amendment in cases like *Hans v. Louisiana*." *Union Gas, supra*, at 23-24 (citations omitted).[2] Justice Steven's opinion states that, notwithstanding the judicially created doctrine of state sovereign immunity, Congress has the plenary power to subject the States to suits in federal court:

> Suffice it to say that the Eleventh Amendment carefully mirrors the language of the citizen-state and alien-state diversity clauses of Article III and *only* provides that "[t]he Judicial power of the United States shall not be construed to extend" *to these cases*. There is absolutely nothing in the text of the Amendment that in any way affects the

[2]Had Congress intended to include the doctrine of sovereign immunity in the Eleventh Amendment, it would have done so specifically; the Eleventh Amendment was merely intended to bar citizens of another state, or aliens, from suing a state in federal court. *See e.g., Atascadero States Hosp. v. Scanlon*, 473 U.S. 234, 286-90 (1985). As the dissent pointed out in *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991), 111 S.Ct. 2578, there is no constitutional principle of State sovereign immunity, no constitutionally mandated policy excluding suits against States from federal court and the historical analysis that supports this view already has been exhaustively detailed in numerous decisions. Blatchford, *supra*, 111 S.Ct. at 2586.

other grants of "judicial power" contained in Article III. Plainer language is seldom, if ever, found in constitutional law.

Pennsylvania v. Union Gas, supra, 491 U.S. at 24.

Hans v. Louisiana departed from the plain language, purpose, and history of the Eleventh Amendment, extending to the states immunity from suits promised under the "arising under" jurisdictional grant of Article III, *Pennsylvania v. Union Gas, supra*, 491 U.S. at 25.[3] The expansion of state immunity is "not a matter of Eleventh Amendment law at all, but rather it is based on a prudential interest in federal-state-comity and a concern for 'Our Federalism.'" *Id.* at 25. Justice Stevens' concurring opinion correctly points out that the Eleventh Amendment, as does Article III, speaks in terms of judicial power. Thus, the question is whether the federal court has power to entertain the suit, and in cases where there is no such power, Congress may not provide it. However, many Eleventh Amendment decisions do not deal with judicial power at all but instead speak in terms of federalism and comity, and are better understood as invoking these

[3]*Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991) does not resolve the Eleventh Amendment Immunity issues in the case at bar. The Supreme Court in *Blatchford* was not asked to revisit *Hans v. Louisiana*. Instead, the respondent argued that the traditional principles of immunity presumed by *Hans* do not apply to suits by sovereign Indian tribes, and even if they did, the states had consented to suit in the "plan of the convention." *Blatchford, supra*, 111 S.Ct. at 2581. The Supreme Court rejected the respondent's argument that state sovereign immunity does not extend to suits by another sovereign (*citing* to *Monaco v. Mississippi*, 292 U.S. 313 (1934)) and also rejected the "plan of the convention" argument that the states waived their immunity against Indian tribes when they adopted the Constitution. Furthermore, the Supreme Court in *Blatchford* only addressed the question of damage suits against the State and not any issue of injunctive or other prospective relief.

concerns. *Union Gas, supra*, at 25-27. The broad notions of sovereign immunity accepted in federal jurisprudence since *Hans v. Louisiana* are not merely, "misguided as a matter of federal law" but they are also unjust. *Hess v. Port Authority Trans-Hudson Corp.*, ___ U.S. ___, 115 S.Ct. 394 (1994) (Stevens, J., concurring).[4]

If the Supreme Court adopts the interpretation of the Eleventh Amendment found in Justice Steven's concurrence, the Petitioner prevails and the State of Florida's claim of sovereign immunity fails. For purposes of the remaining arguments in this brief, however, Amicus Curiae will assume that the principles of Eleventh Amendment sovereign immunity, as embodied in *Hans v. Louisiana*, 134 U.S. 1 (1890), are applicable.

II.

CONGRESS HAS THE POWER TO ABROGATE ELEVENTH AMENDMENT IMMUNITY AND EXPRESSLY DID SO BY ENACTING THE INDIAN GAMING REGULATORY ACT (IGRA).

In enacting the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §2701 et seq., Congress unequivocally expressed its intention to abrogate the Eleventh Amendment bar to suits against the states in federal court.

[4]Particularly in this case, where the states sought the legislation, and where the legislation was a compromise to give the states some control over Indian gaming, it is truly unjust to allow the State of Florida to assert sovereign immunity when it failed to comply with its duty under IGRA. Moreover, the Seminole Tribe did not seek monetary relief and, therefore, concerns over the vulnerability of the State's purse is not a concern here, as it may be in some instances. *See e.g., Hess v. Port Authority Trans-Hudson, Corp.*, ___ U.S. ___, 115 S.Ct. 394 (1994).

Not only did Congress unequivocally intend to abrogate the State's Eleventh Amendment immunity but it had the power to do so under Commerce Clause. IGRA was enacted following the decision of *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) which left Indian gaming largely unregulated by the states; it was enacted at the urging of the states, who sought to be involved in the process of regulating Indian gaming.

a. Congress Has The Power Under The Indian Commerce Clause, As Well As Under The Interstate Commerce Clause, To Abrogate Eleventh Amendment Sovereign Immunity

Although the Eleventh Amendment was not intended to bar a suit by a citizen of a State against his own State, see Argument I, *supra*, the Supreme Court has held that the principle of sovereign immunity limits the grant of judicial authority in Article III, *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), and thus, in order to overcome this immunity, Congress must make its intent clear in the legislation and it must do so under a specific constitutional power.

The Eleventh Circuit acknowledged in its opinion in *Seminole Tribe of Florida v. State of Florida*, 11 F.3d 1016 (11th Cir. 1994), that the Supreme Court has held that Congress has the power to abrogate a state's Eleventh Amendment immunity pursuant to the Commerce Clause; however, the court of appeals erroneously concluded that Congress' power to abrogate the Eleventh Amendment existed only pursuant to the Interstate Commerce Clause. The court of appeals distinguished the facts in the case at bar from those in *Union Gas* by finding that *Union Gas* was limited solely to the exercise of Congress' power to legislate

under the Interstate Commerce Clause. Acknowledging an intention by Congress to abrogate State sovereign immunity when it passed IGRA, the court below nevertheless found that it was passed pursuant to the Indian Commerce Clause and that the "unique abrogation power afforded Congress under the Interstate Commerce Clause in *Union Gas* could not be extended to the Indian Commerce Clause." *Seminole Tribe v. State, supra*, 11 F.3d at 1027.

The Eleventh Circuit was incorrect for a number of reasons. First, Congress had the power under the Indian Commerce Clause to abrogate the State's Eleventh Amendment Immunity. Second, Congress also had the power to abrogate the State's sovereign immunity pursuant to the Interstate Commerce Clause.

Power Under The Indian Commerce Clause

The plain language of Article I, §8, cl.3 gives Congress the power to regulate commerce and defines what types of commerce: with foreign nations, and among the several States and with the Indian Tribes. As the Supreme Court stated in the "License cases," *Thurlow v. Com. of Mass.*, 46 U.S. (5 How.) 504 (1847), the words in this clause give "all the authority which the United States have over Commerce." *Id.* at 523. The Supreme Court recognized that Congress has the power to abrogate the State's Eleventh Amendment immunity when regulating interstate commerce. *Union Gas, supra*. That the Supreme Court has recognized the existence of this power when Congress enacts legislation pursuant to the Interstate Commerce Clause does not mean that Congress does not also possess the same power when regulating commerce with Indian tribes.

The decision in *Union Gas* implicated one of the three types of commerce which Congress has the power to regulate. This does not mean, however, that Congress cannot similarly legislate with regard to the other types of commerce mentioned in the Commerce Clause, pursuant to the same constitutional grant of plenary power. As the district court noted below, "[i]t is a mistake to simply dismiss *Union Gas* as being inapposite, especially since congressional power over both interstate and Indian commerce derives from precisely the same constitutional clause, Article I, §8, cl. 3, and since its power in both areas is plenary." *Seminole Tribe v. State*, 801 F.Supp. 655 (S.D. Fla. 1992).

In *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192-93 (1989) the United States Supreme Court recognized that the Interstate Commerce Clause and the Indian Commerce Clause have very different applications:

> [W]hen the Interstate Commerce Clause is concerned with maintaining free trade among the States even in the absence of implementing federal legislation, the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs.

Id. at 192 (citations omitted). *Cotton Petroleum* does not hold that the Indian Commerce Clause gives Congress less power than does the Interstate Commerce Clause, it simply holds that Indian tribes are not states for purposes of the Interstate Commerce Clause and that broad principles of preemption under the Interstate Commerce Clause would not apply. 490 U.S. at 191-192.

Amicus Curiae does not dispute that the Interstate Commerce Clause and the Indian Commerce Clause have different applications. Tribal reservations are not states and the "differences in the form and nature of their sovereignty make it treacherous to import to one notions of preemption that are properly applied to the other." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980). However, the unique standing of federally recognized Indian tribes in no way restricts the power of Congress to override a state's Eleventh Amendment immunity under the Indian Commerce Clause. To the contrary, the sovereign power of the Indian tribes makes it an even more compelling argument that Congress has the power, under the Indian Commerce Clause, to abrogate a state's claim of sovereign immunity against an Indian tribe.[5]

In overriding the states' Eleventh Amendment immunity when enacting IGRA, Congress was legislating in the field of Indian affairs. Congress clearly had the power to do so under the Indian Commerce Clause and it intended to do so. Indeed, the Indian Commerce Clause provides a stronger basis than the Interstate Commerce Clause for Congress to abrogate State sovereign immunity. In a reaffirmation of an Indian tribe's inherent power of self government, the Supreme Court stated that, absent Congressional action, no state may impose its laws on the reservation. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991). The court of appeals in *Spokane Tribe of Indians v. Washington State*, 28 F.3d 991 (9th Cir. 1994) reasoned, "Congressional power

[5]In *Ramah School Bd. v. Bureau of Rev.*, 458 U.S. 832 (1982), finding that federal law preempted state taxes and that it imposed an impermissible burden on tribal sovereignty, the Supreme Court recognized the broad power of Congress to regulate tribal affairs under the Indian Commerce Clause. *Id.* at 837.

pursuant to the Indian Commerce Clause, then, cannot be less than its authority under the Interstate Commerce Clause." *Id.* at 997. The Ninth Circuit in *Spokane* agreed with the district court judge in the case at bar that, based on its paramount and plenary authority over Indian affairs, Congress' power to act pursuant to the Indian Commerce Clause is at least as great, if not greater than its power under the Interstate Commerce Clause. In fact, the plurality[6] in *Union Gas* speaks in terms of the Commerce Clause as a whole, and that decision was not limited to the Interstate Commerce Clause. *Spokane, supra*, 28 F.3d at 996. Through the Indian Commerce Clause, the states relinquished authority over Indian affairs to the federal government. Pursuant to its plenary[7] power to legislate in the field of Indian affairs, Congress had the power to abrogate the sovereign immunity of the states. With the adoption of the United States Constitution, Indian relations became the exclusive province of federal law, *Oneida County, N.Y. v. Oneida Indian Nation of New York State*, 470 U.S. 226, 234 (1985), and as a result, the states ceded whatever authority they previously had to regulate Indians affairs.

In *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) the Supreme Court held that Congress could abrogate a state's sovereign immunity when acting pursuant to its plenary authority under §5 of the Fourteenth Amendment. In exercising its power under the Fourteenth Amendment,

[6]"Although Justice Brennan's opinion in *Union Gas* was a plurality opinion, a fifth Justice, Justice White, agreed that states are not immune from suit under statutes enacted pursuant to the Interstate Commerce Clause, provided the Congressional intent is clear." *Spokane Tribe of Indians v. Washington State*, 28 F.3d 991, 996 (9th Cir. 1994).

[7]Plenary does not mean absolute and Congress is, of course, subject to constitutional constraints. *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 83-85 (1977).

Congress was acting pursuant to an amendment of the Constitution whose other sections by their terms embodied limitations of state authority. *Union Gas, supra*, 491 U.S. at 16-17. As noted in *Union Gas*, the Commerce Clause, like the Fourteenth Amendment, gives Congress power while taking it away from the states. The broad grant of power to Congress over Indian affairs necessarily limits the power of the states. *Spokane, supra*, 28 F.3d at 996. Congressional power over Indian Commerce and Interstate Commerce derives from the same clause of the Constitution and Congressional authority to abrogate the State's immunity cannot be less under one clause than the other. Moreover, based on its plenary authority over Indian affairs, Congress' power to act pursuant to the Indian Commerce Clause is at least as great, if not greater than its power under the Interstate Commerce Clause.[8]

Power Under The Interstate Commerce Clause

Congress also had the power under the Interstate Commerce Clause to enact IGRA and to abrogate the State's Eleventh Amendment immunity. For reasons often explained in terms of comity or federalism, power under the Interstate Commerce Clause has not always been given as broad an interpretation as the power to legislate Indian

[8]In fact, the delegation of power to the states to regulate Indian gaming conflicts with the deeply rooted policy of leaving Indians free from states' jurisdiction. *See, e.g., McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 168 (1973); *Rice v. Olson*, 324 U.S. 786 (1945). Thus, perhaps the question should be whether Congress had the power at all to enact legislation which allows the states to regulate Indian gaming. Certainly, to delegate such power to the states, pursuant to the request of the states, but at the same time allow the states to invoke sovereign immunity when sued to enforce the requirement to negotiate in good faith, would surrender federal control of Indian matters to the states and, given the express language of the Indian Commerce Clause, raises serious constitutional issues.

commerce and foreign commerce. However, Congress also possesses the power under the Interstate Commerce Clause to abrogate a state's sovereign immunity. In *Employees v. Missouri Dept. of Public Health and Welfare*, 411 U.S. 279 (1973), the Supreme Court acknowledged that the states surrendered a portion of their sovereignty when they granted to Congress the power to regulate commerce. *Id.* at 286.[9] The power to regulate commerce includes the power to override a state's immunity from suit as long as Congress has expressed an intent to do so. The Eleventh Circuit opinion acknowledged that Congress has the power, under the Interstate Commerce Clause, to abrogate a state's Eleventh Amendment sovereign immunity claim. The Supreme Court has specifically decided this in *Union Gas, supra*, 491 U.S. at 14-15. The Eleventh Circuit simply

[9]Although the Eleventh Circuit opinion rejected the argument that the State may have consented to suit either explicitly, under the "plan of the convention" (by ratifying the Constitution), or by participation in a Congressional program, Amicus Curiae notes that in this case the states not only participated in the enactment of IGRA but they actually pursued it in order to have a voice in regulating Indian gaming and to enforce the states' laws. The states consented to suit by participating in the enactment of IGRA. The Eleventh Circuit rejected the Seminole's reliance on *Parden v. Terminal Railway of Alabama*, 377 U.S. 184 (1964) and concluded that *Parden* was "not quick enough to breath life into the Indian tribes' claims in these cases." Under *Parden*, by entering a field of economic activity that is federally regulated, a state impliedly consents to suit and waives sovereign immunity. The reports of *Parden's* death are greatly exaggerated. The attempt to distinguish *Parden* on the basis that the activity involved there was typical of individuals is too narrow. The states entered into the field of economic activity regarding Indian gaming regulation and indeed sought the enactment of IGRA in order to participate in this economic activity. They have, therefore, waived any immunity they may have had. "Indeed, principles of state sovereignty are singularly out of place in such a scheme where the federal government is tailoring a limited grant of power to the states. In this case, sovereign immunity would undermine rather than promote the assertion of state interests." *Spokane Tribe of Indians v. Washington*, 28 F.3d 991, 997 (9th Cir. 1994).

decided that IGRA was not enacted under the Interstate Commerce Clause. This conclusion is incorrect. Congress had the power to enact IGRA under both the Indian Commerce Clause and the Interstate Commerce Clause.

Congress has the power to abrogate Eleventh Amendment immunity when it is exercising any constitutional provision that gives Congress plenary power over matters affecting the states. *Spokane, supra*, 28 F.3d at 995. The fact that IGRA primarily involves matters relating to Indian tribes does not mean that these matters cannot also involve issues of interstate commerce affecting the states.

IGRA was enacted following the Supreme Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) which made tribal sovereignty subordinate only to the federal government. Although IGRA reaffirmed the federal interest in providing a means for self-sufficiency and economic development for Indian tribes, it was also a response to concerns of the states which sought a voice in regulating gaming within their borders. Pub.L. 100-497 100th Cong. 2nd Sess. 1988. In fact, IGRA actually provided the states with a role in Indian gaming that they did not possess after the Supreme Court decision in *Cabazon*. Given the involvement of the states in the passage of IGRA, and the policy reasons for its passage, which was the result of a compromise urged by the states, Congress' power under the Interstate Commerce Clause can be relied upon as a basis for overriding the State's sovereign immunity.

In enacting IGRA, Congress tried to fashion a plan that would give the states a voice in how tribal gaming should operate and also a means to enforce the states' own laws. *Spokane, supra*, 28 F.3d at 997. The *Background* of

P.L. 100-497, S.Rep.No.446, 100th Cong. 2d Sess. (1988) specifically notes that state and federal law enforcement officials expressed fear that Indian bingo and other gambling enterprises could become targets for infiltration by criminal elements. S.Rep. 446, *supra* at 1. Although, as noted in the "Additional Views" of Senator McCain in that Senate Report, as the debate on IGRA unfolded it became clear that the interests of the states and of the gaming industry extended far beyond their expressed concern about organized crime and centered more in the protection of their own games from a new source of economic competition, the fact remains that the states made organized crime their motive for seeking the enactment of IGRA and Congress relied on this stated intent in enacting it. 25 U.S.C. §2702(2). Moreover, assuming the states also had an economic interest in urging the enactment of IGRA, it cannot be seriously argued that gaming has no effect on interstate commerce. By its very nature gaming affects commerce between the states. Both the desire to protect gaming from the influences of organized crime, and the economic interest in protecting their own economy, affect interstate commerce.[10]

In a challenge to the power of Congress in enacting the Organized Crime Control Act of 1970, 84 Stat. 922, the Third Circuit Court of Appeals in *United States v. Ceraso*, 467 F.2d 653 (3rd Cir. 1972), rejected the argument that Congress lacked the power to enact the Act. Citing to the evidence given to Congress showing the serious effects of gambling on interstate commerce the court said:

[10]The State attempts to have it both ways. It wants to allow for the power of Congress to enact IGRA to impose the State's regulation on Indian gaming but it does not want to comply with its duty under the Act to negotiate in good faith.

> The Report of the President's Commission on Law Enforcement and Administration of Justice, *supra*, at 188-89 stated that "gambling is the greatest source of revenue for organized crime." It noted that estimates of the total amount bet through organized crime's facilities each year varied from $7 billion to some $50 billion. All of this activity was accomplished by an intricate system of local, regional, and national "lay-off men," who through the use of the facilities of interstate commerce, captured the substantial bankroll which has been used to "infiltrate legitimate businesses and labor unions, to harm investors and competing businesses, and to corrupt the democratic process." *Schneider v. United States*, 459 F.2d 540, at 542 (8th Cir. filed April 12, 1972). As we previously noted, Congress placed great reliance on the report and the findings it contained. We find that this information was a sufficient rational basis for the conclusion that gambling produced serious detrimental effects on interstate commerce. Further, Congress acted within its authority because the means selected for controlling this evil are reasonably related to the effectuation of the end sought to be achieved.

United States v. Ceraso, supra, 467 F.2d at 657-58.

The Organized Crime Control Act set forth Congress' findings about the effects of organized crime on interstate commerce: it is a highly sophisticated and widespread activity that drains the economy by unlawful conduct and illegal fraud and corruption. The Organized Crime Control Act cites gambling as one of the sources from which organized crime derives its power and finds that this power

and money are increasingly used to infiltrate and corrupt legitimate business and corrupt the democratic process:

> [O]rganized crime activities in the United States weaken the stability of the nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce and undermine the general welfare of the nation and its citizens. . .

467 F.2d at 658 n.7

In *United States v. Sacco*, 491 F.2d 995 (9th Cir. 1974) (*en banc*), the appellants challenged 18 U.S.C. §1955 stating that its prohibition of illegal gambling businesses regulated purely local activity and had no effect on interstate commerce. The Ninth Circuit rejected that argument stating that although an activity is local and not regarded as commerce, it can be reached by Congress if it exerts a substantial economic effect on interstate commerce. *See also, Perez v. United States*, 402 U.S. 146 (1971) (Loan sharking operations are carried on, to a substantial extent, in interstate and foreign commerce, and through the means and instrumentalities of such commerce, and even where extortionate credit transactions are purely intrastate in character, they nevertheless affect interstate and foreign commerce). The class of activities which Congress intended to regulate under IGRA burdens interstate commerce. Congress has found that gambling is one of the sources from which organized crime derives its power. Therefore, Congress had a rational basis to find that the regulated activity affected commerce and the regulatory scheme provided by IGRA is reasonable. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

The legislative history of IGRA is replete with references to Congress' concern over the infiltration of organized crime into tribal gaming operations. *See, e.g.*, S.Rep. No. 446, 100th Cong., 2d Sess. 1, 5 (1988). Congress enacted IGRA not only to ensure tribal self-sufficiency, because this was assured to Indian tribes by *Cabazon* and its limits on a state's authority, but also to protect gaming from the corrupting influences of organized crime. Because the stated policy in enacting IGRA was, in large part, to provide a statutory basis for the regulation of gaming by Indian tribes, to shield the gaming from organized crime and other corrupting influences, to ensure that the Indian tribes were the primary beneficiaries of the gaming operation and to also ensure that gaming was conducted fairly and honestly, this policy gives Congress the power under the Interstate Commerce Clause to abrogate the state's sovereign immunity.

b. Congress Intended To Abrogate Eleventh Amendment Immunity By Enacting The Indian Gaming Regulatory Act.

The Eleventh Circuit Court of Appeals in its opinion recognized that Congress intended to abrogate the State's sovereign immunity when it enacted IGRA. *Seminole Tribe v. Florida, supra*, 11 F.3d at 1024. Congress may abrogate the State's Eleventh Amendment immunity from suit only when the Congressional intent to abrogate that immunity is unequivocal. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985). (Congress has power to abrogate state immunity when acting pursuant to §5 of the Fourteenth Amendment); *see also, Union Gas, supra*, 491 U.S. at 7 (Congress must make its intent to override a state's immunity unmistakably clear); *Dellmuth v. Muth*, 491 U.S. 223, 227 (1989) (same). In enacting IGRA Congress gave federal district courts jurisdiction "over three types of

cases, the first of which is 'any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith.' The only possible defendant to such a suit is a state." *Seminole Tribe of Florida v. State of Florida, supra*, 11 F.3d at 1024 (citations omitted). It is clear that Congress intended to abrogate the state's sovereign immunity when it enacted IGRA. The question is not whether Congress intended to abrogate sovereign immunity when it enacted IGRA, and respondent conceded as much, *Seminole Tribe v. Florida*, 801 F. Supp. at 658, referring to the State's Memorandum at 1, but whether Congress had the power to abrogate the State's Eleventh Amendment. Congress had such power under the Indian Commerce Clause as well as under the Interstate Commerce Clause.

III.

EX PARTE YOUNG AUTHORIZES THE SEMINOLE TRIBE'S FEDERAL CLAIMS AGAINST STATE OFFICIALS FOR PROSPECTIVE RELIEF.

The Eleventh Amendment does not prohibit suits against state officials based upon violations of federal law when only prospective injunctive and declaratory relief is sought. *Green v. Mansour*, 474 U.S. 64, 68 (1985). The Seminole Tribe's lawsuit against the Governor of the State of Florida, Lawton Chiles, properly sought to invoke the doctrine of *Ex parte Young* and force the state officials to negotiate in good faith. Under IGRA, state officials are required to conduct negotiations for Class III gaming in good faith, and the Act creates a cause of action which gives the federal court jurisdiction for failure of a state to

enter into negotiations, or to conduct such negotiations in good faith. 25 U.S.C. §2710 (d) (7) (A) (i).

Sovereign immunity does not preclude a suit against a state official for prospective relief designed to vindicate federal law. *Pennhurst State School and Hosp., v. Halderman*, 465 U.S. 89, 104-06 (1984). Petitioner sought to require the Governor of the State of Florida to negotiate a compact in good faith and asked for declaratory relief. The Governor is the official in the State of Florida authorized to negotiate on behalf of the state, therefore, the prospective relief requested by Petitioner clearly falls within the doctrine of *Ex parte Young*. *Pennhurst State School & Hosp., supra*, 465 U.S. at 102-03. If a suit seeks prospective relief against a state official to vindicate federal law, it is permitted under *Ex parte Young* notwithstanding the impact on the state itself. *Id.* at 104.

Moreover, the Eleventh Circuit incorrectly held that the actions of the State involved discretionary acts. The State is required to negotiate in good faith and has no discretion to decline to do so. 25 U.S.C. §2710(d)(3)(A). If the state official declines to negotiate at all, there are procedures in IGRA which prescribe the process for regulating the Class III gaming. Because the State of Florida opted to negotiate with Petitioner, it was required to negotiate in good faith; this was not discretionary. It was only the decision to negotiate at all which was discretionary.

Under *Ex parte Young*, the State's assertion of sovereign immunity to bar the lawsuit by Petitioner must fail. Even if the Court were to decide that the Eleventh Amendment bars a lawsuit by a citizen against his own state, based on the need to promote the supremacy of

federal law, *Pennhurst State School and Hosp., supra*, 465 U.S. at 105, such immunity would not apply here.

CONCLUSION

For the reasons stated above, Amicus Curiae, the Miccosukee Tribe of Indians of Florida, supports the Petitioner, the Seminole Tribe of Florida, in its request to reverse the judgment of the Eleventh Circuit Court of Appeals.

Respectfully Submitted,

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